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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 782

INTERNATIONAL CABLE T.V. CORPORATION, a California Corporation,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, GEORGE G. GROVER, and FREDERICK H. HOLOBOFF, the members of and constituting said Public Utilities Commission,

Respondents,

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California Corporation, and ALL METAL FABRICATORS, INC., a California Corporation.

Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI

to the Supreme Court of the State of California

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Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

International Cable T.V. Corporation prays that a writ of certiorari issue to review the judgment of the

Supreme Court of the State of California, entered in the above-entitled case on July 26, 1967.

OPINIONS BELOW

The opinion of the respondent Public Utilities Commission is not yet published. The opinion, and the dissent thereto, are annexed hereto as Appendix A. The Public Utilities Commission's Order denying a rehearing is attached hereto as Appendix B. The Petition to the Supreme Court of the State of California for a Writ of Review or in the Alternative, for a Writ of Mandamus, and the subsequent Petition for Rehearing to the Supreme Court of the State of California were both denied without opinion. The notices thereof are attached hereto as Appendix C.

JURISDICTION

The decision of the California Public Utilities Commission was issued on November 9, 1966, to become effective on November 19, 1966. A Petition for Reconsideration to the Public Utilities Commission, timely filed, was denied without opinion. A timely Petition for Writ of Review was filed with the Supreme Court of the State of California on January 9, 1967 and was denied without opinion on July 5, 1967. A timely Petition for Rehearing was filed with the California Supreme Court on July 20, 1967 and was denied without opinion on July 26, 1967. On October 24, 1967, petitioner applied for an extension

of ten days within which to file the within petition. Said application was granted on October 26, 1967.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257.

STATEMENT OF GROUNDS

A concise statement of the grounds upon which jurisdiction of this Court is invoked is as follows:

The only appellate review allowed from decisions of the respondent Commission is by way of petition for writ of review to the Supreme Court of the State of California.[1] Whether or not the petition for review is allowed is discretionary with that Court.

The California Supreme Court, by denying without opinion the Petition for Writ of Review and for Rehearing, has established the attached decision of the Public Utilities Commission as controlling precedent within the State of California for petitioner and for all parties similarly situated. The Public Utilities Commission decision, on a case of first impression within the state, made an arbitrary classification between members of the public and, relying on that classification, dismissed petitioner's complaint which had alleged discrimination against it by a regulated public utility. The Public Utilities Commission made its decision while denying petitioner an opportunity to be heard with respect to the issues of law and fact

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[1]Public Utilities Code, Sections 1756 through 1767. These sections are set forth verbatim in Appendix D hereto.

decided. Thus the respondent Commission not only sanctioned a denial to petitioner of equal protection of the laws, but denied petitioner due process during the course thereof. Petitioner is one company in the new and rapidly growing community antenna television (CATV) industry, every member of which is similarly situated. The present and future of this industry, and of regulated public utilities are inextricably interwoven.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

QUESTIONS PRESENTED

The questions presented on this petition are as follows:

1. Whether petitioner was denied a hearing and an opportunity to present evidence on the questions of fact and mixed questions of law and fact necessarily decided by the respondent Commission, thereby denying petitioner due process in contravention of the Fourteenth Amendment.

2. Whether the subject decision makes an arbitrary and unreasonable discriminatory classification between members of the public, thereby depriving petitioner of equal protection of the laws and contravention of the Fourteenth Amendment.

3. Whether the subject decision is supported by substantial, or any, evidence.

STATUTES AND REGULATIONS INVOLVED

Public Utilities Code of the State of California, Section 453—No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudic or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section. (Deering's California Codes, Vol. 1, Public Utilities, p. 81.)

Public Utilities Code of the State of California, Section 207—"Public or any portion thereof" means the public generally, or any limited portion of the public, including a person, private corporation, municipality, or other political subdivision of the State, for which the service is performed or to which the commodity is delivered. (Deering's California Codes, Vol. 1, Public Utilities, p. 14.)

Public Utilities Code of the State of California, Section 701—The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. (Deering's California Codes, Vol. 1, Public Utilities, p. 141.)

The Constitution of the United States, Amendment 14, Section 1—All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

As indicated, no trial on the merits of this matter has been had. Yet the subject decision refers to and discusses many factual matters taken from the pleadings, the memoranda submitted the parties, and the limited material presented at the hearing on the temporary restraining order issued by the respondents. Further, the making of the decision necessarily involved determinations as to matters of fact on issues raised by the complaint, and not tried. No findings of fact were prepared, submitted, or ruled upon. Accordingly, the following factual material, which is taken from the decision (Appendix A) unless otherwise indicated, cannot be considered as settled except in certain instances.

On March 31, 1964, pursuant to Section 53066 of the Government Code of the State of California,[2] pe-

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[2]The Government Code of the State of California, Section 53066 provides—Any city or county or city and county in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. In connection therewith, the governing body may prescribe such rules and regu-

titioner secured a non-exclusive franchise from the County of Los Angeles (App. A, p. 16) which entitled petitioner to build, own and operate a community antenna television system anywhere within the non-incorporated area of the County of Los Angeles.

During January, 1966, petitioner formally applied to The Pacific Telephone and Telegraph Company, hereafter known as The Pacific Company, to lease pole line facilities in the Altadena area. (App. A, p. 16.)

The Pacific Company pole attachment policy, which it claimed it had developed and consistently adhered to with the object of conserving available pole space, was to permit, on its own poles or those jointly owned with other utilities, only one CATV pole attachment per pole on a first-come-first-served basis. The Pacific Company further claimed that this policy had been carried out on a non-discriminatory basis, which had proved workable and in accord with the generally

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lations as it deems advisable to protect the individual subscribers to the services of such community antenna television system. The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid. Any cable television franchise or license awarded by a city or county or city and county pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties or public easements of said city or county or city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purpose whatsoever. (Deering's California Codes, Vol. 7, Government Code, 1966 Pocket Supplement, p. 49.)

accepted economics of the CATV industry, i.e., that any given area will support only one CATV system, and that Pacific had at the time of the hearing some 120 pole attachment agreements in effect, which agreements provided that they were subject to the approval first obtained of the Public Utilities Commission of the State of California, and to such modification or change as the Commission might order. (App. A, pp. 4-5.) Pacific further asserted that from the inception of the industry, it has, without exception, furnished pole attachment space to the first applicant for such space who could fulfill the obligations set forth in the agreement; i.e., pole attachment space has been rendered on a first-come-first-served basis. (App. A, p. 26.)[3]

Petitioner's written application to lease pole line facilities from The Pacific Company covering the Altadena area was prepared and delivered to The Pacific Company on January 11, 1966 and was executed by petitioner and The Pacific Company on March 28, 1966. (App. A, p. 6.)

However, real party in interest All Metal had been discussing with The Pacific Company the same geographical area with respect to CATV service. On February 28, 1966, All Metal made application to The Pacific Company to lease channel facilities for all but a portion of the same area of Altadena which was the

[3]The source of this material is the pleadings and memorandum of The Pacific Company. Whether or not the policy is actually administered in a non-discriminatory manner would be impossible to ascertain without a hearing.

subject matter of the agreement between petitioner and The Pacific Company. At that time, All Metal advised The Pacific Company that it had received a franchise from the County of Los Angeles as of February 17, 1966. In fact, the franchise was not acquired until March 8, 1966, and was not to be effective until the completion of publication. (App. A, pp. 16-17.)

Following the execution of the pole attachment agreement between petitioner and The Pacific Company, the latter volunteered to discharge the duty of filing the same with the Public Utilities Commission and of securing its approval, or authorization thereof pursuant to the Commission's rules. (App. A, pp. 6-7.) Petitioner was advised by The Pacific Company that until such approval or authorization was secured neither The Pacific Company nor petitioner could take any further steps to implement the agreement. (App. A, p. 17.) However, The Pacific Company delayed until the 28th of April, 1966, before filing the agreement with the Commission, and thereafter took no steps to obtain approval. (App. A, p. 2.)

By contrast, the agreement between All Metal and The Pacific Company was filed on the same date on which it was executed. (App. A, p. 2.) This latter agreement provided that The Pacific Company would make diligent efforts to have the facilities available for All Metal before September 15, 1966. (App. A, p. 8.) The Pacific Company admitted that during July, 1966, the construction for All Metal was commenced and pursued expeditiously until the issuance

by the respondents of the temporary restraining order on August 16, 1966. At that time, the work had been substantially completed. (App. A, p. 8.) Petitioner had alleged that the construction was on a crash basis. (App. A, p. 2.) Petitioner also claimed that the activities of The Pacific Company and All Metal Fabricators was the result of a conspiracy to delay petitioners entry into the CATV business in the particular area of Los Angeles County. (Cpl. Paras. VIII, XV, XVI, XXII, XXX.)

Though not dealt with by the decision, petitioner's complaint alleged in particularity a number of overt acts on the part of real parties in interest by which the discrimination against petitioner was effectuated. (Cpl., Paras. XXVI, XXVII, XXVIII and XXIX.)

Prior to the decision of respondent Commission, attached hereto as Appendix A, it was the established practice of The Pacific Company, concurred with by respondent Commission, to obtain the approval or authorization of the Commission before implementing any agreements of the nature of those between The Pacific Company and All Metal, and The Pacific Company and petitioner. Neither service was offered, or accepted, pursuant to the provisions of any tariff on file with respondent Commission or with any other commission. To the extent that The Pacific Company furnished leased pole line facilities or leased channel facilities, it did so pursuant to special contracts of the exact same stature insofar as the respondent Commission was concerned. (App. A, pp. 2, 5, 6, 7, 17, 25-26, 34-35, and see Footnote 2 at p. 6.)

On August 15, 1966, petitioner's complaint was filed with the respondent Commission. On August 16, 1966, the Commission, on consideration of the allegations of the complaint, and in order to preserve the status quo, issued and served a temporary restraining order, together with copies of the complaint, directing immediate cessation of construction of the subject facilities and ordered a hearing on August 19, 1966. Defendants were directed to file answers to the complaint on or before that date and such time as might be designated by the presiding officer. (App. A, pp. 3-4.) The hearing on the temporary restraining order was held before Examiner Gregory, at which time some evidence was received, and defendants, neither of whom had theretofore filed answers, were directed to file answers on or before August 31, 1966. Memoranda of Points and Authorities were requested from various parties and the temporary restraining order was ordered to remain in effect until further order of the respondent Commission. (App. A, p. 4.) Thereafter, answers were filed, and all parties submitted Memoranda.

The next thing that occurred was that on November 9, 1966, while petitioner was preparing for trial or hearing on the issues raised by the pleadings, the respondent Commission issued the decision which is set forth in Appendix A hereto.

Accordingly, the first opportunity afforded petitioner to raise the issues presented by the petition was on the 21st day of November, 1966, when a petition for reconsideration with respect to the decision

of the respondent Commission was filed. In that petition, it was contended that the Commission had made a decision on questions of fact and on questions of mixed law and fact which created an unreasonable and discriminatory classification. It was further contended that the Commission had done so without giving petitioner an opportunity to present evidence thereon, and without providing for a hearing on the merits of the case, in violation of the principles of due process and of equal protection of the laws, and in contravention of applicable decisions of the Supreme Court of the United States.

As indicated by Appendix B, the petition for reconsideration was denied without opinion.

Thereafter, a petition for Writ of Review, or in the alternative, for a Writ of Mandamus, and Memorandum of Points and Authorities in support thereof was directed to the Supreme Court of the State of California, S.F. 22,494. In that petition and memorandum and in the reply of petitioner to the answer thereto, and in the petition for rehearing directed to that Court the same contentions were made. In each instance, the petitions were denied without opinion.

Petitioner has timely raised the federal considerations involved and has exhausted all available state remedies in a timely manner.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS NEW QUESTIONS VITALLY IMPORTANT TO THE PUBLIC AND THE NASCENT CATV INDUSTRY

This case presents a novel question bearing on the ability to survive of the independent CATV industry. A CATV business's ability to enter and stay in business depends on two basic ingredients—a license or franchise from a political subdivision, and access to utility poles located on public rights of way and dedicated to public use. A major portion of the investment in said business is represented by the cables, wires, and electronic components attached to those poles. For obvious reasons telephone operating companies wish to own and control all such facilities and all access thereto. The decision of the Public Utilities Commission has serious and far-reaching results. One result will be that independent CATV operators who construct their own system will be discriminated against, insofar as access to poles is concerned, in favor of those operators who will be willing to lease channel facilities from a telephone company. This fact, coupled with the clear intention of the telephone companies, as evidenced by their active and growing participation in the industry through leaseback arrangements, will inevitably lead to even tighter control of market entry by its effect on local franchise authorities, and may presage the demise of the independent operator in the industry.

This case then actually involves not only one operator in Altadena, California, but hundreds of operators in California, and uncounted ones in other parts

of the country. The public, as well as the rapidly growing CATV industry,[4] is affected because they, as telephone subscribers, are paying for the telephone companies' involvement in the industry, and they may be affected as to the cost and quality of CATV services.

PETITIONER WAS DENIED A HEARING AND AN OPPORTUNITY TO PRESENT EVIDENCE

The decision itself (App. A) demonstrates that no hearing was had on the merits. (App. A, p. 4.) At the "hearing" referred to by the decision, only one witness was heard, and that witness was produced solely for the purpose of showing justification for the continuance of the restraining order pending further pleadings. (App. A, p. 6.)

It is also clear from a reading of the opinion that decisions were made on questions of fact, and on mixed questions of law and fact. For example, on page 13 of Appendix A there appears the following:

> Extended reference has been made to Pacific's answer not only to indicate the broad context in which this controversy arises, but also because, unlike the answer filed by All Metal, it meets complainant's allegations squarely and thus, together with the complaint, forms a well-defined frame within which to consider *the mixed questions of law and fact disclosed by the pleadings.* (App A, p. 13; emphasis added.)

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[4] According to *Television Fact Book,* No. 37 (1967) Seventh Volume, p. 54 a, there are 1,700 operating CATV systems serving 2,000,000 television homes throughout the country.

The ultimate finding of the decision is:

> We hold that Pacific, in providing the facilities or service described in the International and All Metal agreements in question, did not violate the provisions against preference or prejudice set forth in section 453 of the California Public Utilities Code. (App. A, p. 36.)

In order to reach this ultimate finding the decision first had to decide that those members of the public using leased pole line facilities were different in kind, rather than in degree, from those members of the public using leased channel facilities. In addition, the respondent Commission deemed it necessary to find that The Pacific Company had made a public offering of the latter type of service, but had not made such a public offering of the former. Further, though the opinion fails to deal expressly with the matter, in order for the decision to be valid, there also must be an implied finding that the classification made between members of the public was a reasonable one.

Petitioner believes that such evidence as was available, the uncontradicted allegations of the pleadings and the admissions of the parties, clearly indicates the exact contrary of these findings. However, whether right or wrong, these decisions were of fact, and were made without hearing, and without allowing petitioner an opportunity to produce evidence relevant to the questions.

The rule is well established that, when an administrative body acts judicially, notice and an opportunity for hearing are indispensable to due process. *Brink-*

erhoff-Faris Trust & Sav. Co. v. Hill, 50 S.Ct. 451, 281 U.S. 673, 74 L.ed. 1107, 1113; *Magnolia Petroleum Co. v. Carter Oil Co.,* C.A. Okl. 1955, 218 F.2d 1 (6) cert. den. 75 S.Ct. 605, 349 U.S. 916, 99 L.ed. 1249. Due process of law includes reasonable notice and the right to be heard, whether the tribunal exercising jurisdiction over the rights and privileges protected by the due process clause is judicial, legislative, or administrative. *Morgan v. United States,* 58 S.Ct. 773, 304 U.S. 1, 82 L.ed. 1129; *Willner v. Committee on Character & Fitness,* 83 S.Ct. 1175, 373 U.S. 96, 10 L.ed.2d 224, cf. *Interstate Commerce Com. v. Louisville & N.R. Co.,* 33 S.Ct. 185, 227 U.S. 88, 57 L.ed. 431.

Assuming, arguendo, that there is any difference in kind between the services to be performed by The Pacific Company for one type of agreement as opposed to the other, any proper classification of the two should be a function performed by the Commission after appropriate hearings on the merits. The decision necessarily involves mixed questions of law and fact. *Western Union Tel. Co. v. Call Pub. Co.,* 21 S.Ct. 561, 181 U.S. 92, 45 L.ed. 765; *Pennsylvania Co. v. United States,* 35 S.Ct. 370, 236 U.S. 351, 59 L.ed. 616; *Baringer & Co. v. United States,* 63 S.Ct. 967, 319 U.S. 1, 87 L.ed. 1171. Such being so, the proper parties are entitled to present evidence in connection therewith. This is nothing more than a simple matter of constitutional due process. *Morgan v. United States, supra.*

Further, and again assuming for the purpose of argument, that there is in fact any such difference in

the services, and that a proper classification had been properly arrived at, any difference in treatment to be afforded to the various classes of the public must be reasonable. Reasonableness is, again, a factual issue within the jurisdiction of the Commission to rule upon and is subject to the same standards of due process.

The hearing did not meet those standards set forth in *Railroad Commission of California v. Pacific Gas & Electric Co.*, 58 S.Ct. 334, 302 U.S. 388, 82 L.ed. 319 (322), which stated,

> "There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial and the Commission must act upon evidence and not arbitrarily."

Not only must there be notice and an opportunity to be heard, but an opportunity to give evidence. Merely summoning a party to Court and then making a determination of issues, and of the factual questions without a hearing is not due process. (*Burket v. Reliance Bank & Trust Co.*, 367 Ill. 196, 11 N.E.2d 6.)

The need for a full and fair hearing before the Commission is especially vital in view of the failure of the state to provide appellate review from a decision of the respondent Commission. Review may only be obtained by petition addressed to the Supreme Court of California[5] and no new or additional evidence may be introduced.[6] The issue here is similar in many respects to that raised in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 57 S.Ct.

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[5]Public Utilities Code Section 1756. See Appendix D for text.
[6]Public Utilities Code Section 1757. See Appendix D for text.

724, 301 U.S. 292, 81 L.ed. 1093. In that case, the commission had before it a question of evaluation of telephone company properties as of a date certain and during succeeding years.

After extensive hearings, which produced a voluminous record, the commission chose to adjust property values on the basis of information not contained in the record by the expediency of taking judicial notice of certain economic indices, and without giving the telephone company an opportunity to explain or rebut. The sole method of review of the commission's decision was by petition in error to the state Supreme Court, which did not consider new evidence. The Supreme Court said that in such cases, where there is no trial de novo, regulatory bodies with broad administrative discretion must maintain a policy of a fair and open hearing throughout the entirety of the proceedings. (*Id.*, pp. 1101-1102.) The holding was that the telephone company had been deprived of the kind of fair hearing essential to due process.

The departure from due process in the instant case was of the same nature, but was of far greater degree.

THE SUBJECT DECISION DEPRIVED PETITIONER, AND THOSE SIMILARLY SITUATED, OF EQUAL PROTECTION OF THE LAW

Respondent Commission attempts to support its findings by referring to The Pacific Company's "public offering" of leased channel facilities, as evidenced by The Pacific Company's attempt to file a tariff

covering such services. This is contrasted with the lack of such a public offering of leased pole line facilities, and the "passive" nature of the telephone company's service in such a situation.

There was no evidence indicating that the telephone company's services were "passive" on the one hand and not on the other. In truth, the telephone company's position is not passive in either situation and an evidentiary hearing will so demonstrate. As to the tariff offering, the decision itself points out in a footnote on page 2 that the proposed tariff was suspended by the respondent Commission and later withdrawn by The Pacific Company. Further, the decision refers to the fact that The Pacific Company states that it is prepared to make a tariff offering with respect to leased pole line facilities.

Thus, the decision demonstrates that both services are performed pursuant to the exact same type of offering, i.e., special contracts, filed for Commission, "approval," following this decision; and filed for, "authorization," prior to the time of this decision.

The only real evidence available as to a "public offering" is that produced by the pleadings and admissions of The Pacific Company. These demonstrate that The Pacific Company had maintained for years a fixed policy with respect to leased pole line facilities, i.e., first come, first served, one customer only, and that there were 120 such agreements in effect at the time of the hearing. Contrasted with this was the demonstration that there were only two leased channel facility agreements in effect in the whole of the oper-

ating territory of the company prior to the one at issue in the subject decision.

As is pointed out by the two dissenting Commissioners (App. A, p. 38), the concept of "dedication," "holding out," or "public offering" looks to what a utility does.

Petitioner did not, and does not take a position as to whether or not a telephone company offering of leased pole line facilities, or leased channel facilities, or either of them, are, or are not public utility services by nature. Petitioner's only position is that whatever they are, they are so closely interrelated, so directly affect market entry and market control by their effect on access to poles dedicated to public use and located on public rights-of-way, that they ought to be treated the same. And, if any distinctions are to be made, the result must be such that the telephone company is not left with an uncontrolled license to discriminate. *Nebbia v. New York,* 54 S.Ct. 505, 291 U.S. 502 (525), 78 L.ed. 940, 89 ALR 1469. It is also settled that the reasonableness of such regulation depends on the relevant facts. *Nebbia v. New York, supra; Hartford Co. v. Harrison,* 57 S.Ct. 838, 301 U.S. 459, 81 L.ed. 1223.

Although Public Utilities Code Section 453 is not discriminatory on its face, it is well established that a statute lawful on its face may become unlawful through its application. *Gregory v. Barr,* 203 F.2d 364. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by ex-

press terms of a statute or by its improper execution through duly constituted agents." *Glicker v. Michigan Liquor Control Commission,* 160 F.2d 96 (99) citing from *Sunday Lake Iron Company v. Township of Wakefield,* 38 S.Ct. 495, 247 U.S. 350, 62 L.ed. 1154.

There is no rational grounds for making a distinction between the two groups of operators. The difference involved is one of degree only, not of kind. Both are lessees of the telephone company; both construct their own antenna and accessory equipment; both provide CATV services to members of the public; both depend for their very livelihood on access to utility poles dedicated to the public and located on public rights-of-way; and both kinds of operators and the telephone company are well aware that there is, in economic fact, only room for one in any given geographic area.

Classifications must embrace all who belong in the same category and may not be capricious or arbitrary. *Royster Guano Co. v. Virginia,* 40 S.Ct. 560, 253 U.S. 412, 64 L.ed. 989; *Pfeiffer Brewing Co. v. Bowles,* 146 F.2d 1006, cert. den. 65 S.Ct. 913, 324 U.S. 865, 89 L.ed. 1420.

Petitioner recognizes that a law is not unconstitutional merely because it results in financial injury to a citizen where it is reasonably necessary to preserve important public interest. Neither is it unconstitutional because it preserves one interest over another if there is a preponderant public concern in the preservation of one over the other. *Porter v. Shibe,* 158 F.2d 68. However, the instant decision

demonstrates no public interest or public concern to justify a classification which protects channel leases as opposed to pole line leases. The public concern would seem, in fact, to be contra to this policy. The public is best served when healthy competition is encouraged, and it has long been accepted public policy to encourage independently owned small business.

THE SUBJECT DECISION IS NOT SUPPORTED BY SUBSTANTIAL, OR ANY, EVIDENCE

Where there is an insufficiency of evidence, or no substantial evidence to support a finding by an administrative board and its decision results in a deprivation of property, as it did in the instant case, the deprivation is without due process of the law. Forkosch, *Constitutional Law,* Section 188. In order for a conclusion of fact to be supported by substantial evidence, there must be a rational connection between the facts proved and the facts inferred.

It is petitioner's contention that the few facts which can be accepted from admissions in the pleadings in no way support the conclusion of the respondent Commission. Such being the case, it may reasonably be inferred that in order to reach these conclusions, the Commission must have used facts found outside the evidentiary record, or has made its decision without any substantial evidence. In either case petitioner has been denied due process. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, supra; Tot v. United States,* 63 S.Ct. 1241, 319 U.S. 463, 87 L.ed. 1519.

CONCLUSION

The Court is presented here with a novel question of immense importance to a new industry and involving the important constitutional guarantees of the Fourteenth Amendment. Proper application of these guarantees, before the Courts and the Commission, is one way in which the relationship between the telephone industry and the CATV may be worked out.

It may be the only way.

Wherefore, your petitioner prays that the subject decision be reversed, and that the Public Utilities Commission of the State of California be required to reopen proceedings for full evidentiary hearings on the issues necessarily involved to render a decision on the complaint of petitioner.

Dated, October 31, 1967.

Respectfully submitted,
HAROLD R. FARROW,
DIRKS B. FOSTER,
Attorneys for Petitioner
International Cable T.V.
Corporation.

(Appendices A, B, C and D Follow.)

Appendix A

Decision No. 71559

Before the Public Utilities Commission
of the State of California

Case No. 8499

International Cable T.V. Corporation, a California corporation,
Complainant,

vs.

All Metal Fabricators, Inc., a California corporation, and The Pacific Telephone and Telegraph Company, a California corporation,
Defendants.

Harold R. Farrow, for Complainant.

Edward Sumner, for All Metal Fabricators, Inc. and A. T. George, Pillsbury, Madison & Sutro, by *G. H. Eckhardt* and *R. W. Odgers,* for The Pacific Telephone and Telegraph Company, Defendants.

OPINION

International Cable T.V. Corporation (International), in a complaint filed August 15, 1966, alleges in substance that defendants, The Pacific Telephone and Telegraph Company (Pacific) and All Metal Fabricators, Inc. (All Metal). conspired to evade the so-called

"1956 Consent Decree"[1] and to delay complainant's entry into the community antenna television (CATV) business in portions of the unincorporated area of Altadena and La Canada, Los Angeles County, under a pole contact agreement with Pacific, dated March 28, 1966, by a "crash" program of building channel facilities for All Metal in the same area, under a "Memorandum of Agreement", dated May 19, 1966 and a "Contract For Community Antenna Television Channels", dated June 13, 1966. (The pole contact and channel agreements were submitted by Pacific to the Commission for authorization on April 28, 1966 and June 13, 1966, respectively.)

Complainant alleges that defendants' activities not only prevented it from obtaining the normally "perfunctory" Commission authorization for its prior pole contact agreement, but also operated to burden Pacific's rate-paying customers by construction of channel facilities for All Metal at less than cost, and to mislead the Commission by the device of having All Metal file a sham complaint against Pacific, speciously alleging unjust discrimination and asking for denial of authorization for International's pole contact agreement, without naming International as a party. (*All*

[1]That decree, among other matters, enjoined the American Telephone and Telegraph Company and its subsidiary operating companies from engaging in any business other than the furnishing of "common carrier communications services". *(U.S. v. Western Electric Co. and American Tel. and Tel. Co.* (1956) U. S. Dist. Ct., N.J. Civil Action No. 17-49.)

Metal Fabricators, Inc. v. Pacific Tel. and Tel. Co., Case No. 8421, filed May 23, 1966 and now at issue. Complainant here requests consolidation of Case No. 8421 with the instant proceeding.)

Complainant asks, in substance, that the Commission order defendants to cease and desist from building, selling, leasing or using, or attempting to do so, the channel facilities described in the complaint, for transmission or distribution of broadcast signals within the described areas of Altadena or La Canada, or any other area within Los Angeles County; that defendants be ordered to dismantle and take down the CATV facilities and appurtenances thus far constructed, other than telephone plant *per se;* that complainant's pole attachment agreement with Pacific be immediately approved and Pacific be ordered to cooperate in the construction of complainant's system within the area described in its agreement; that complainant "be made whole on account of the damages suffered as aforesaid."

The Commission, on consideration of the allegations of the complaint and in order to preserve the status quo, on August 16, 1966 issued and served on defendants a temporary restraining order, together with a copy of the complaint, directing, until further order of the Commission, immediate cessation of Pacific's channel facilities construction for All Metal and use of such facilities by All Metal for CATV business in the Altadena areas in question, ordered a hearing to be held on August 19, 1966 and directed defendants to file answers to the complaint on or before the date

of hearing, or at such time as might be designated by the Presiding Officer.

The hearing prescribed by the temporary restraining order was held before Examiner Gregory, evidence and argument were received, defendants were directed to file answers, and the parties to file memoranda of points and authorities, on or before August 31, 1966, and the temporary restraining order was ordered to remain in effect until further order of the Commission. The answers and memoranda have been filed and considered, along with the complaint, Pacific's "Offer of Proof" (filed prior to the hearing) and the evidence and argument adduced at the hearing.

Pacific's answer denies any conspiracy by co-defendants and in substance avers that: jurisdiction over this controversy lies only in the Federal Communications Commission or this Commission and that the 1956 Consent Decree is irrelevant here; Pacific has observed its duties to provide adequate and nondiscriminatory services as set forth in Public Utilities Code sections 453 and 761 and sections 201 and 202 of the Communications Act of 1934, as amended; Pacific has a statewide franchise under section 7901, Public Utilities Code, to construct telephone lines upon any public road or highway in Los Angeles County and throughout California, including private lines for transmission of television and related signals for CATV systems; Pacific's pole attachment policy, developed and consistently adhered to with the object of conserving available pole space, has been to permit, on its own poles or those jointly owned with other

utilities, only one CATV pole attachment per pole on a "first-come-first-served" basis, and that such policy, averred to have been carried out on a non-discriminatory basis, has proved workable and in accord with the generally accepted economics of the CATV industry, i.e., that any given area will only support one CATV system; that Pacific presently has some 120 pole attachment agreements in effect, and that such agreements provide that they are subject to this Commission's approval first obtained, and to such modification or change as the Commission may order, and also provide:

> "The Company declares that the filing of the contract herein with the Public Utilities Commission pursuant to the procedural requirements of General Order No. 96-A is not to be construed as a public offering by the Company of the services or facilities hereinabove referred to."

Pacific's answer continues with averments that it has made a public offering of channel facilities for use in CATV local distribution systems, available to any and all CATV operators desiring such service, by filing with this Commission, on November 3, 1965, an intrastate tariff offering such service; that such tariff was suspended by the Commission by its order of suspension and investigation in Case No. 8305, filed November 23, 1965, as amended by the Commission's order of January 18, 1966; that the Federal Communications Commission, by public notice dated April 7, 1966, asserted jurisdiction over such service as "incidental to radio communication" and has ordered Pacific to file interstate tariffs for this service; that

the FCC order became non-appealable sixty days after its effective date.[2]

Pacific avers that its channel facilities publicly offered for CATV use are no different in nature from the facilities it uses to provide other private line services such as telephoto services and facilities for the transmission of television signals for broadcast stations; denies the allegations of paragraphs XII and XIII of the complaint and avers that the chronology of events referred to therein (negotiations with Pacific for complainant's pole attachment agreement) was as set forth at pages 6-9 of Pacific's Offer of Proof; admits that it executed a pole attachment agreement with complainant on March 28, 1966 and avers that it required and received nothing from complainant other than the insurance and bond documents called for by the agreement, complainant's designation of the area for which pole attachments were desired, and three copies of complainant's franchise from Los Angeles County; that Pacific explained to

[2]Attached to Pacific's answer are: a copy of its Offer of Proof, filed herein August 18, 1966, to which are attached copies of the FCC's public notice of April 7 and its Memorandum Opinion and Order of June 22, 1966, refusing reconsideration of its direction to file interstate channel facility tariffs; a copy of its answer, filed June 13, 1966, to All Metal's complaint in Case No. 8421, to which are attached copies of certain correspondence and the agreements (including area maps) with International and All Metal, referred to herein, together with a copy of a Commission letter, dated April 5, 1966 (File No. 508), to Pacific stating that a channel facility agreement between Pacific and Warner Bros. T.V. Services, Inc. (filed by Pacific for authorization) would not be authorized during the pendency of Case No. 8305. (That contract was later authorized conditionally.) Case No. 8305 has been discontinued, following withdrawal by Pacific of its intrastate channel facility tariff filed with this Commission on November 3, 1965 (Decision No. 71334, dated September 27, 1966).

complainant the procedures for filing and "approval" of the contract by the Commission, after necessary processing by Pacific, and that Pacific would-and did-file the agreement.

Other denials and averments by Pacific relate to complainant's allegations concerning: Pacific's conspiracy with All Metal and the former's attempt to secure a monopoly of CATV business; Pacific's delay in securing Commission authorization for complainant's pole attachment agreement; Pacific's collusion with All Metal in having All Metal file a complaint against Pacific (Case No. 8421), as to which Pacific avers, referring to its answer in that case (Appendix B to its answer herein) that All Metal, in Case No. 8421, sought no relief from Pacific but only simultaneous "approval" by the Commission of All Metal's channel contract and International's pole attachment agreement, and that the relief requested by Pacific in its answer to that complaint was a matter for regulatory determination.

Pacific's answer avers, further, that construction of channel facilities for All Metal commenced during the week of July 25, 1966 and was pursued expeditiously and economically until issuance of the temporary restraining order herein; that about 40 per cent of the channel facilities are "double lashed" to existing telephone plant and that four new poles and related equipment were erected in the construction of those facilities; that double lashings are now and for many years have been used by Pacific and other telephone utilities within California, with knowledge of this

Commission's staff, and that double lashings are an economical use of plant and do not have a detrimental effect on telephone service.

Pacific denies the allegations of paragraph XXX of the complaint, which assert that unless the emergency relief prayed for is granted defendants' acts "will have effectively eliminated any competition for the supply of community antenna television services in the Altadena area, whether said competition be from complainant or from any other person, firm or corporation." Pacific further denies, for lack of information or belief, the allegations of paragraphs XXIX and XXXI of the complaint, which refer to complainant having learned, during the early part of the week of August 8, 1966, of the commencement of a portion of the construction of channel facilities for All Metal, and on August 11, 1966 having learned that the construction had not only been commenced but substantially completed and was scheduled for completion on August 13, 1966. We here note that the concluding paragraph of Pacific's "Memorandum of Agreement" with All Metal, dated May 19, 1966 (Appendix C of Pacific's Offer of Proof and referred to in the "Contract For Community Antenna Television Channels", dated June 13, 1966) states that "Telephone Company shall make diligent effort to have said channel services available for All Metal's use on or about September 15, 1966", subject to certain provisos, including one stating that "Telephone Company shall in no event furnish said channel services in the advance of the effective date of said tariff (Pacific's

suspended intrastate channel tariff) or contract, as the case may be".

Pacific, as its separate and affirmative defense, has incorporated in its answer pages 1 to 9 of its Offer of Proof, filed herein August 18, 1966 (excluding only the submissions of counsel set forth below the line appearing on page 9 and through page 11). The incorporated matter that Pacific has offered to prove, without challenge to or concession of this Commission's jurisdiction to grant all or any part of the relief requested by complainant herein and within reasonable time limitations, alleges facts concerning Pacific's development of its policy of accommodating, in the public interest, CATV installations on its poles, or on poles jointly owned with other public utilities, noting that Government Code section 53066, enacted in 1963, provides that cities and counties may enfranchise or license the construction of a CATV system and may authorize the grantee to place "wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county or city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purpose whatsoever".

Pacific then alleges that local governments, under this section, in some instances have asserted the authority to choose among applicants for franchises or

to designate specific areas to be served. Other local governments, it is alleged, have issued nonexclusive, broad franchises and in effect have left the CATV operators so franchised to struggle among themselves for economic survival. (The Los Angeles County franchises held by International and All Metal which are pertinent here appear to be nonexclusive.)

With respect to channel agreements, Pacific, in the incorporated matter from its Offer of Proof, alleges that: in the late 1940's and early 1950's, when CATV companies began to develop the business of providing good quality television reception principally in areas remote from television broadcasting stations, Pacific faced a serious "held order" situation for basic telephone services, due to postwar population and business growth in California, and was not able to devote channel equipment to CATV use; later, with alleviation of the held order problem it was able to provide such facilities; in 1956 the California Supreme Court (*Television Transmission v. Public Util. Com.*, 47 Cal. 2d 82) held that CATV's were not public utilities (i.e., telephone corporations) and, therefore, not subject to the jurisdiction of this Commission; in 1964, Pacific secured this Commission's authorization for the first agreement in California offering channels for local distribution by a CATV company, over objection by several CATV operators and a city, the latter on the ground that no franchise had been obtained from the city for the proposed service (*P.T. & T. Co-Omni-Video, Inc.* (1964), 63 Cal. P.U.C. 388, at p. 391);

that the Commission concluded, in the cited case, that since it had no jurisdiction over CATV's—

> "The matter of whether or not a city franchise has been obtained, or is even required, by Omni-Video is likewise not controlling here. The protests of CATV operators (directed at the franchise situation and also at service and rates) are therefore irrelevant to our determination. . . .
>
> "The sole issue before us is whether or not the items of the contracts are reasonable and specifically whether they might cast a burden upon Pacific's customers. The only questions in this regard were those raised by the staff concerning return of the deposits. We find that both contracts should be modified by elimination of the provisions permitting early refund of the deposits so that said deposits cannot be refunded in full in less than 10 years. Such modifications will provide ample protection to Pacific against possible losses in the event of early termination of service without the necessity of adjusting the rate of refund.
>
> "Since this is a new type of service being offered costs have been based on estimates. After Pacific has had a reasonable amount of experience in providing the new service it will be expected to regularize the charges by filing a tariff."

Pacific alleges that, in harmony with the last paragraph quoted above, it filed a tariff on November 3, 1965, setting forth its public offering of channels for local CATV distribution systems.

Other allegations in the incorporated matter from Pacific's Offer of Proof are, in substance, that: in

the interval between a prehearing conference (March 17, 1966) in this Commission's tariff suspension proceeding (Case No. 8305) and the scheduled hearing days (commencing May 9, 1966), the FCC, referring to prior correspondence with The American Telephone and Telegraph Company, asserted jurisdiction over channel offerings for local CATV distribution systems by its public notice of April 7, 1966, in which it declared: "The furnishing of such facilities by a common carrier is 'incidental to radio communication'"; also, "CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry and, hence, are engaged in 'interstate communication by wire' to which the provisions of The Act apply"; that Pacific and the other operating companies were ordered to file tariffs for this service with the FCC; that on May 3, 1966, the American Company transmitted to the FCC for filing, under protest, copies of the tariffs and the two Pacific contracts which were then in effect, namely, the Omni-Video contract, previously referred to, and an agreement with Warner Bros., Inc. for the Mission Viejo development in Orange County; that American's petition for reconsideration (and that of the General Telephone System as well) was denied on June 22, 1966, and that such denial stands as a final order of the FCC.

The balance of the incorporated matter consists of factual allegations by Pacific concerning its preliminary negotiations with complainant and All Metal leading to execution of the agreements herein with the

two CATV operators, and allegations concerning the pleadings in Case No. 8421. Pacific asks that the complaint herein be dismissed.

Extended reference has been made to Pacific's answer not only to indicate the broad context in which this controversy arises, but also because, unlike the answer filed by All Metal, it meets complainant's allegations squarely and thus, together with the complaint, forms a well-defined frame within which to consider the mixed questions of law and fact disclosed by the pleadings.

All Metal has incorporated its answer, filed September 1, 1966, in its "Brief" filed the same day. Since the answer is largely argumentative its incorporation in All Metal's "Brief" justifies us in considering it chiefly as an extension of All Metal's argument; however, to the extent that it contains any denials, averments or other defensive responses that can be identified with specific allegations of the complaint, we will consider those responses as having been directed to such allegations.

All Metal, in addition to requesting general relief, in substance asks that:

1. The complaint be stricken as "fraudulent, false and sham pleading" and that, in any event, it be dismissed as to All Metal.

2. Case No. 8421 be retained as a separate matter from the instant case.

3. The temporary restraining order be dissolved.

4. Pacific be directed "to proceed forthwith with the prompt processing of the June 13, 1966, agreement for approval by the Public Utilities Commission". (That agreement, filed June 13, 1966, is now before the Commission in this proceeding, as well as in Case No. 8421.)

5. In the event the Commission "somehow" concludes that it has jurisdiction of any controversy existing between All Metal and International, regarding damage done by either to the other, that All Metal be allowed to file a cross-complaint against International "for the substantial damages which will accrue and have accrued to All Metal as the result of the filing of the false and fraudulent complaint herein". (Ans., pp. 13-14.)

All Metal, in its response, asserts that no evidence was received at the August 19 hearing herein to support either the issuance of the restraining order or the factual basis upon which the complaint is predicated. (The only factual evidence, other than two area maps, received at that hearing consisted of testimony by Clarence Unnevehr, an engineer and former employee of this Commission and presently a consultant for the CATV Association, with broad experience in public utility regulation. The witness testified concerning a field inspection he had made, shortly before the hearing, of Pacific's channel construction for All Metal in Altadena, and gave his opinion on certain economic advantages and disadvantages to the CATV operators and Pacific he considered would result from distribution of signals by channel facilities as compared with pole attachments.) All Metal asserts that it will suffer

"irreparable injury" if the restraining order is not dissolved forthwith; that concurrently with the filing of the instant complaint International commenced active solicitation of customers in the Altadena area although it has no plant there, and that its complaint should be recognized simply as an attempt to use this Commission "to give International Cable a business advantage which it cannot otherwise lawfully obtain" (Brief, p. 2).

All Metal, in its answer, after asserting it is not a public utility and is not subject to the jurisdiction of this Commission, and did not, merely by filing a complaint against Pacific (Case No. 8421), submit to this Commission's jurisdiction in connection with any dispute between All Metal and any other nonutility organization, refers to the chronology of its negotiations, allegedly commencing about the first week in December, 1965, for a pole attachment agreement with Pacific in the Altadena area and avers that, having been advised by Pacific that a pole attachment in that area was available, it obtained a franchise from the Board of Supervisors of Los Angeles County by ordinance adopted March 8, 1966; that, shortly after All Metal was advised by Pacific that a pole attachment was available, one of All Metal's employees advised the then president of International that All Metal "was going into the Altadena area, and shortly thereafter the then president of International Cable laughingly advised said employee of All Metal that International had outmanuevered (sic) All Metal by filing a written application for a pole attachment agreement before

All Metal had the opportunity to so do." All Metal then avers that it learned from Pacific that Pacific was "treating International Cable as the first applicant for a pole attachment in the Altadena area, and that pursuant to Telephone Company policy they would not entertain other applications in that area", despite the fact that All Metal was financially able to install a "high quality" system in that area while International was not.

All Metal, in response to paragraphs XII and XIII of the complaint, "notes" that its oral application to Pacific preceded both the oral and written application of International, and that "the only reason All Metal did not submit a written application for a pole attachment agreement was the position taken by The Pacific Telephone and Telegraph Company employees that such a written application would not be entertained after International Cable made its letter request, as aforesaid, upon learning of All Metal's intention of going into the Altadena area". (Ans., par. 9.) (We note that the pleadings herein disclose that International's franchise from Los Angeles County, for portions of the Altadena-La Canada area, was granted on March 31, 1964 and that All Metal's franchise was granted on March 8, 1966, some two months after International, as averred by Pacific (Offer of Proof, p. 7), had formally applied to Pacific for pole attachments in the Altadena area.)

All Metal then avers that it inquired of Pacific concerning availability of telephone company lines and facilities, "on a lease basis", to connect All Metal's

head end site with its prospective subscribers in Altadena, and that on or about February 28, 1966, shortly after All Metal was "awarded" its Los Angeles County franchise (All Metal avers, variously, that the franchise was "awarded" on February 11, 1966 and February 17, 1966, and that the ordinance "formalizing" the franchise was adopted by the Board of Supervisors on March 8, 1966 and thereafter published as required by the local ordinance), All Metal made a written request to Pacific for lines and facilities in the Altadena area, and on May 19, 1966 entered into a Memorandum of Agreement "to get work started" and deposited $30,000 with Pacific to cover the estimated cost of work and materials pending execution of a formal contract, which was ultimately executed on June 13, 1966 and is now before the Commission for "approval". (It should bear emphasis that although the parties have used the term "approval" in connection with contracts presented to the Commission that may require its action, what the Commission actually does is simply to grant or withhold "authorization", sometimes conditional, for the utility to carry out the terms of such agreements. The distinction may appear to be a question of semantics, but it is, nevertheless, real and in some cases, as here, may involve a question of jurisdiction.)

All Metal then asserts that Pacific, at no time from December, 1965 to date, disclosed to All Metal any information whatsoever about International, or Pacific's negotiations with International, except the information that Pacific was treating International

as the first and only applicant for a pole attachment agreement in the Altadena area.

Specifically responding to Paragraph XV of the complaint (which alleges a conspiracy between Pacific and All Metal to destroy International's property rights and those of others similarly situated), All Metal asserts that Pacific's employees with whom it had contact during the entire period of its contract negotiations all emphasized their obligation "to respect the confidentiality of dealings with customers and Pacific's desire to avoid involvement in any CATV enterprise." Consequently, All Metal asserts, "the contention that All Metal and Pacific entered into a conspiracy of any kind is as ridiculous and farfetched as it is false." (Ans., par. 13 and, in similar vein, pars. 14-16.)

Responding to paragraph XVI of the complaint (which alleges details of the "conspiracy", poses the resultant burdens International has claimed would be cast on Pacific's ratepaying customers by construction of channel facilities "at a price less than the cost thereof", and alleges delay by Pacific in filing complainant's pole attachment agreement with the Commission), All Metal asserts that the charges made under its contract of June 13, 1966 will produce for Pacific "a profit at least as great as the return derived by Pacific on equipment furnished to telephone subscribers", and that the contract, in any event, is by its terms subject to Commission "approval" and adjustment of rates. All Metal then avers that the balance of paragraph XVI (sub-pars. 2-6) contains allegations

that are either "false", "misleading", or "unfounded", and that "if a three-month delay in processing an application for a pole attachment agreement is legitimate cause for complaint to the Public Utilities (sic) and cause for filing charges of conspiracy and criminality, then the Commission should shortly be receiving many, many complaints in form similar to the instant one." (Ans. par. 17.) (Our decision herein may, we hope, serve to alleviate All Metal's concern on that score.)

All Metal continues, in its answer, with responsive matter purportedly directed at specific allegations (pars. XVII-XXXII) of the balance of the complaint. Its response to those allegations, like that addressed to earlier portions of the complaint, is, for the most part, so replete with invective, argument and explanatory detail of an evidentiary nature that, except for some assertions tending to indicate its position and objectives, one is at some pains to discover just what it conceives to be the issues of fact or law involved in this controversy. Since All Metal's Brief and its Answer, incorporated therein, are of record, and since enough, we think, has been said to indicate the nature of its contentions of fact and law, further detailed reference to those documents, at this point, will serve no useful purpose.

We note, however, what All Metal says in paragraph 20 of its answer, identified with paragraph XIX of the complaint. All Metal states that "it should be noted" that its complaint in Case No. 8421 complains only of Pacific's conduct; that since this

Commission had no jurisdiction over CATV companies any cause of action All Metal might have against International was to be pursued in the courts and not before this Commission, and that this Commission (as set forth in All Metal's complaint) should be concerned about the activities of a public utility "which might give an inequitable preference to one of two business competitors." In any event, the averment proceeds, there was no conspiracy involved in the filing of that complaint and International was not deliberately omitted as a defendant pursuant to a conspiracy of any kind.

We next turn to a discussion of the written argument presented by the Memoranda of Points and Authorities filed by complainant and Pacific in elaboration of their contentions made at the hearing on August 19. To the extent that All Metal's "Brief", incorporating its Answer, may contain legal argument, that also will be considered. We note, parenthetically, that both All Metal's Answer and Brief and complainant's Memorandum were filed subsequent to August 31, 1966, the date fixed by the Examiner at the hearing. No good reason appears, however, for not giving due consideration to those documents. We will first consider complainant's contentions.

Complainant argues, in substance, that Pacific, by means of its channel facility arrangements with All Metal, has discriminated "to an extreme" against complainant, which has a prior pole attachment agreement with Pacific covering portions of the same area in Altadena and which, as a member of the "public" as regards Pacific's "provision of services", is entitled,

complainant argues, to equal treatment by Pacific, to be enforced by this Commission. Complainant, at the hearing referred to a number of sections of the Public Utilities Code and to *Commercial Communications v. Public Util. Comm.* (1958), 50 Cal. 2d 512, which sections and cited case, together with authorities cited in its Memorandum, assertedly provide ample jurisdiction for this Commission to entertain the instant complaint and grant the relief requested.

Statutes cited by complainant at the hearing and in its Memorandum are:

Public Utilities Code secs.

207—Defining "Public or any portion thereof."

216—Defining public utilities subject to Commission jurisdiction.

451—Requiring all charges by a utility for products or commodities furnished, or any service rendered, to be reasonable, and that utilities shall furnish adequate, etc. service and facilities necessary for public safety, etc.

453—Forbidding utilities to grant preferences or subject any person to any prejudice or disadvantage, with respect to rates, charges, service, facilities, or in any other respect, etc.; provides Commission may determine any question of fact "arising under this section."

701—Granting Commission general supervisory and regulatory power over public utilities, necessary and convenient in the exercise of its jurisdiction.

702—Requiring public utilities to comply with any Commission orders "relating to or affecting its business as a public utility", and securing compliance therewith by its employees.

761—Authorizes Commission, after hearing and findings, to prescribe by order or rule reasonable utility equipment, practices and facilities.

762, 767—Authorizes Commission, after hearing and findings, to direct additions, extensions, repairs or improvements to, or changes in, existing plant or structures of any utility or two or more utilities, including division of costs (762). Provides for joint utility use of poles, etc. (767).

851—Relates to sales, leases, encumbrances or other dispositions of utility's line, plant, system, "or other property necessary or useful in the performance of its duties to the public"; does not prevent sales, leases, encumbrances or other disposition by any public utility "of property which is not necessary or useful in the performance of its duties to the public . . ."

6001, 6302—Legislative grant to local bodies to enfranchise, among others, companies that distribute electric power along public ways.

7901—Grants telephone utilities use of public rights of way.

7903—Provides criminal penalties for appropriation of confidential information by any employee or agent of a telephone utility.

Other Statutes and General Orders

G.O. 95—Rules for Overhead Electric Line Construction.

Government Code, Sec. 53066—Grants cities and counties authority to enfranchise or license CATV companies to place wires, conduits, etc. in public ways and easements of the local governments.

Complainant argues that whether the California Supreme Court has held CATV service not to be telephone utility service (*Television Transmission v. Public Util. Comm.*, supra), or the FCC has assumed jurisdiction over Pacific's channel facility offering as a link in interstate common carrier service (an assumption that complainant, citing authorities, strenuously controverts), are considerations irrelevant to the instant case. What complainant stresses here is that there is not, and should not be, a legal distinction between Pacific's "facilities leased" pursuant to a pole attachment agreement and its "facilities leased" pursuant to its "so-called contract for community antenna television channels." Complainant asserts that in neither case are the facilities used as telephone facilities, but in both cases existing and new plant are made available to the CATV operator and are used for the purpose of facilitating the transmission of television signals, and that though there may be a difference in the amount of "service", to pretend there is

a difference in kind as between the two "facilities" is mere sophistry.

Complainant argues further, that public interest and public policy require, in order to conserve physical space in, above and under the public ways and to maintain esthetic values, that, when possible, all pole and wire users join together in a common use of one set of poles and wires; that this policy is recognized in paragraph 8 of complainant's pole attachment agreement (quoted, Memo., p. 6), and by section 762 of the Public Utilities Code (quoted, in part, Memo., p. 6), and that section 767 of the Code gives the Commission authority to require two or more public utilities to make use of the same wire, poles, pipes and other equipment.

Accordingly, complainant argues, although neither complainant nor All Metal is a public utility, this Commission "has the power and jurisdiction to regulate their use of the public right of way, and the joint use of the poles, wires, and conduits placed thereon . . . whether owned by a telephone corporation with a statewide franchise, a power and light corporation with a county franchise, or a private company with a local franchise." Such jurisdiction, complainant asserts, "is, of course, in addition to and different from the jurisdiction the Commission has over the myriad of activities of The Pacific Telephone and Telegraph Company, as a telephone corporation."

Complainant suggests that this Commission should not be bound by decisions of other state commissions or courts (some of which are cited in Pacific's Memo-

randum), which, even if rendered under laws identical with those of California and on questions "squarely and directly" presented, would be of no aid (except perhaps in a rate or tariff filing case) when applied to the "unique facts" of this case.

In conclusion, complainant refers to the testimony of Clarence Unnevehr, mentioned earlier, and asserts that such testimony "demonstrates":

> (a) The installation of both double-lashed cable and new plant construction in the area covered by complainant's pole attachment agreement.
>
> (b) Interference with and damage to existing telephone plant.
>
> (c) Creation of irreparable damage to complainant "by the addition of new installations to be moved, or to be re-arranged, at complainant's expense, and a threat of more of the same."
>
> (d) That if the restraining order is removed, "complainant's opportunity to realize the fruits of its franchise and pole attachment agreement will be completely eliminated."

Complainant argues that the above testimony, coupled with the verified complaint, various admissions, to date, of the two defendants, and the "obvious and continuing loss of income resulting from the defendants' actions", amply demonstrate both the propriety and necessity of continuing the restraining order, to which Pacific, complainant states, has indicated no objection. (Pacific's view, expressed at the hearing and in its Memorandum, was to the effect that since, in any event, authorization for its channel offer-

ing to All Metal was required, either by this Commission or the FCC, it was indifferent to continuation of the restraining order.)

Pacific, discussing in its Memorandum the nature of pole attachment and channel agreements, points out that its individual pole attachment agreements, in a standard form, provide that: the CATV operator (licensee) may place its "cables, guy wires, anchors and other appurtenances" on Pacific's poles, subject to certain specified restrictions including the requirement that the CATV operator pay for all necessary rearrangements of Pacific's facilities; Pacific will furnish space for attachment of CATV-owned facilities for $2.50 per pole per year in the case of cable attachments and $1 per pole per year for attachment of CATV amplifiers; the CATV facilities so attached may be used for distribution to licensee's subscribers, within the area covered by the agreement, of off-the-air television programs, incidental transmission of CATV-originated or off-the-air FM music and for occasional transmission of CATV-originated television broadcasts.[3]

Pacific asserts that from the inception of CATV service, it has, without exception, furnished pole attachment space to the first applicant for such space who could fulfill the obligations set forth in the agreement; i.e., pole attachment space has been rendered on a "first come, first served" basis; likewise, because pole space allotted to communication facilities is

[3]Exhibit "A" of the Memorandum is a copy of the "standard" pole attachment agreement with International, dated March 28, 1966.

limited and is becoming increasingly crowded, Pacific, without exception, has refused to permit later applicants to attach their facilities to poles which are included within the area encompassed in an existing pole attachment agreement.

With respect to the furnishing of channel facilities to CATV operators, Pacific states that it has also entered into several agreements pursuant to which it furnishes such facilities to CATV operators (a typical agreement is the one with All Metal, Exhibit B of the Memorandum). Under channel agreements, Pacific asserts, the operators provide their own antennae and related facilities ("head end" facilities); set their own rates subject to applicable municipal regulation (Gov't Code, Sec. 53066); select off-the-air television signals to be delivered to Pacific for distribution to their patrons; and solicit, select and collect from their own patrons. (Pacific notes here that, contrary to repeated assertions of CATV operators, and their attorneys, channel agreements are not "leases" and certainly are not "lease-backs". This is so, Pacific asserts, because possession and control of and title to the channel distribution facilities remain at all times in Pacific.) Pacific asserts—and the agreements annexed to its Memorandum disclose—that both channel and pole attachment agreements restrict the CATV operator to transmission of the same type programs, mentioned above.

With regard to attachment of CATV-owned facilities to utility-owned poles being a "public utility service" and, as such subject to regulation by this

Commission, Pacific argues that the pole attachment arrangement is conceptually no different from that which would obtain if Pacific were to rent to a CATV operator some of its vacant land or vacant office space in one of its buildings. In such cases, Pacific asserts, it performs no "service"; hence, no violation of the Consent Decree would be involved in such pole attachment arrangements.

Because no "service" is performed under pole attachment agreements, and because it enters into such agreements only when pole space is vacant, Pacific states it has not regarded the terms and conditions of these agreements as subject to regulation by this Commission; however, in a 1954 rate case (*The Pacific Tel. & Tel. Co.*, Decision No. 50258, 53 Cal. P.U.C. 275, 320) the Commission held that certain "special contracts", among them contracts for pole attachments, "performed by the use of operative property and operative personnel of applicant, . . . necessarily and lawfully constitute public utility service subject to the jurisdiction of this Commission." On rehearing of that case, however, and upon Pacific's agreement to file the special contracts with the Commission, the Commission stated (*The Pacific Tel. & Tel. Co.*, Decision No. 50837 (1954) 53 Cal. P.U.C. 662, 665):

> "The proposals of the Company respecting the other special contracts, set forth in Items 4 and 5 above will effectively bring to the knowledge of the Commission the nature and extent of such contracts. Filing by the Company as proposed in Items 4 and 5 above will not be construed by the Commission as a public holding out. Such filing

will not be construed by the Commission as constituting evidence on that subject."

Continuing with the argument, Pacific notes that it voluntarily sought Commission authority to raise its contract rental charges for pole attachments, and the Commission in that case "accepted the fact" that Pacific does not hold itself out as offering pole attachment space to CATV operators or to anyone else (*Pacific Tel. and Tel. Co.*, Decision No. 67694 (1964) 63 Cal. P.U.C. 221, 222).

Pacific has referred to a number of decisions rendered by courts and state commissions in other jurisdictions which, it asserts, are to the effect that the rental of vacant space on its poles is not part of the public service performed by a telephone utility in the business of telephonic communication, and that the granting or withholding by a telephone utility of permission to CATV companies, or others, to use such vacant pole space, absent a public offering, does not involve any question of discrimination, whether competing CATV companies are in the same geographical area or not (*Ceracche Television Corp. v. Public Service Com'n.* (1960) 267 N.Y.S. 2d 969; *WCOG, Inc., et al. v. Southern Bell, et al.* (N.C. Utilities Comm. June 7, 1966) CCH Utilities Law Reporter, part. 20,373, and other cases cited on page 9 of Pacific's Memorandum).

Pacific states, however, that it stands willing to file a tariff which would govern the terms and conditions applicable to the rental of pole attachment space to

CATV operators "provided that this Commission deems such a filing to be in the public interest, that Pacific's ability to render efficient telephone service is not thereby impaired in any way—now or in the future—and that attachments are limited to one per pole", and that Pacific's willingness to file such a tariff with this Commission has been made known to the CATV industry.

As to any distinguishing differences in this Commission's jurisdiction between pole attachment agreements for CATV-owned facilities and agreements whereby telephone utilities furnish distribution channel facilities to CATV operators, Pacific asserts that its offering of distribution channels to CATV operators is a public utility service, recognized as such by this Commission (*Pac. Tel. & Tel. Co.-Omni-Video Inc.,* supra) as consistent with other private line services, such as channels for teletypewriter, signal, telephotographic and facsimile services, and channels for transmission of both broadcast and closed circuit television signals, each of which is a telephone-company-provided communications service, and each is offered to the public through facilities dedicated to the public use. These are the basic tests, Pacific asserts (citing cases) which determine the public utility character of telephone services. Moreover, Pacific maintains, the California Supreme Court has declared that Pacific "is entitled to use its lines interchangeably 'for transmitting telephone messages, telegraph messages, teletypewriter messages, telephotographs, programmed services (including radio and television

broadcasts) and any other communications service by means of the transmission of electrical impulses.'" (*Pac. Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal. 2d 272, 281. Also cited: *Television Transmission v. Public Util. Com.*, supra, at p. 87, and, as in accord the Commission's decision in *Re Pac. Tel. & Tel. Co.*, Decision No. 67334 (1964) 62 Cal. P.U.C. 754—the "STV" case.)

Notwithstanding the great number and variety of questions raised, the essential issue framed by the pleadings in this case (as well as by the pleadings in All Metal's complaint against Pacific, Case No. 8421) is one of unreasonable discrimination, asserted to have been practiced by Pacific in the provision of agreements for pole attachments and distribution channels in partially overlapping areas in Los Angeles County covered by complainant's and All Metal's local CATV franchises. We must determine whether there has been "any preference or advantage" or "any prejudice or disadvantage" granted to or suffered by complainant which may be contrary to the provisions of section 453 of the Public Utilities Code.

Discrimination by a public utility does not mean, merely and literally, unlike treatment accorded by the utility to those who may wish to do business with it, but refers to partiality in the treatment of those in like circumstances seeking a class of service offered to the public in general. With respect to a utility's offer to serve the general public or a limited portion thereof, as evidenced by its schedules of rates and

rules, the offer is made, to the extent of the utility's ability to provide the service, to serve impartially any member of the public who may qualify under the rules and is willing to pay the rates; here the duty to serve impartially is correlative with the right to demand and receive the service applied for. It is, moreover, unlawful in California for a public utility, including a telephone corporation, to make effective any contract, arrangement or deviation for the furnishing of any *"public utility service"* at rates or under conditions other than the rates and conditions contained in its tariff schedules on file and in effect at the time, unless it first obtain the authorization of this Commission to carry out the terms of such contract, arrangement or deviation (Gen. Order No. 96-A, Sec. X.A.; emphasis added).

The CATV channel facilities and service provided by Pacific, either by written contract or pursuant to a tariff offering, unquestionably constitute "public utility service". Pacific constructs, owns, operates and maintains the plant used in the service and provides the energy for transmitting the signal through the facilities so constructed, in the same manner as it provides channels for transmission of other private line services related to telephony which, likewise, are offered to the public through facilities dedicated to the public use. Unless such CATV channel facilities are offered to the public by a filed tariff, authority must first be obtained by Pacific, pursuant to General Order No. 96-A, to make effective any special contract for their provision.

The FCC has asserted jurisdiction over the offering by telephone companies of CATV channel distribution service for signals deemed by that Commission to constitute a link in interstate communications. At least to the extent that the signal transmitted by Pacific's channel facilities is not interstate in character, jurisdiction over the latter resides with this Commission. We do not question the FCC's assertion of authority to control interstate activity under its jurisdiction.

Pacific's willingness, as pertinent to the present controversy, to enter into temporary individual license agreements with CATV operators for use by the latter of vacant space on its poles, is neither an offer nor a providing of "public utility service", since the utility does not hold out such contracts impartially to the general public or does it thereby provide any "service" related to the concept of dedication to the public of a communication service or facility which is the hallmark of a public utility calling. If, for example, an electric utility owning a hydroelectric lake were to grant, subject to certain conditions, temporary individual fishing or boating privileges therein, surely this would not be considered under any rule of law of which we are aware to constitute an "offer" to the general public to provide a "service" to which the general public is entitled in the same sense in which it has a right to demand impartial electric service from the utility; although here, as in the case of pole attachments, a plant "facility" is used in providing the fishing or boating privileges, and the economic

results of such use of those facilities would, as also is the case with pole attachments, be reflected in the utility's overall financial situation. This is not to say, however, that Pacific, either voluntarily or pursuant to a proper order of this Commission, may not at some time make a public offering of pole space to CATV operators.

Although the Commission in its first decision in *The Pacific Tel. and Tel. Co.*, 53 Cal. P.U.C. 275, 320, considered that such pole attachment contracts, performed by the use of Pacific's operative property and personnel, "necessarily and lawfully constitute public utility service subject to the jurisdiction of this Commission," and required that such contracts be filed with the Commission and authorized pursuant to General Order No. 96-A (it having appeared that "all of the revenues, expenses and plant effects" relating to such "contract services" were reflected in Pacific's presentation of that rate proceeding), the Commission, on rehearing of that application, expressly stated and provided (53 Cal. P.U.C. 662, 664-666) that the filing by Pacific of such contracts would be construed neither as a "public offering of the services or facilities" referred to therein, nor "as constituting evidence on that subject." The purpose of such filings, stated by the Commission in the sentence immediately preceding the last two quotations above, was that they "will effectively bring to the knowledge of the Commission the nature and extent of such contracts." In short, what the Commission did in that case was to

provide a procedural method for bringing to its attention an activity of the utility that might be relevant to its determination of reasonable rates.

Such procedural requirements do not touch the question of whether the licensing of vacant space on Pacific's poles to CATV operators constitutes, under the circumstances disclosed by this record, a "public offering" or a "public utility service." The short answer to that question is that Pacific has not yet undertaken (other than as conditionally suggested in its Memorandum) to make such a public offering voluntarily and this Commission has not yet ordered it to do so in an appropriate proceeding.

We hold, therefore, that in the absence of a public offering the rental or licensing by Pacific of vacant space on its poles to CATV operators does not constitute a "public utility service". Therefore, authorization by this Commission of the pole attachment agreement between Pacific and International dated March 28, 1966 is not necessary. Special individual contracts by Pacific for use of such facilities should, however, under the procedural rules mentioned above, be supplied for the information of this Commission.

It follows that complainant, possessing a pole attachment agreement with Pacific is not in like, or similar, circumstances with All Metal, whose agreement with Pacific calls for rendition of a public utility service in all respects like other private line services provided by Pacific and which is subject to different charges, restrictions and conditions of service than those found in Pacific's pole attachment agreements.

Our decision herein will be limited to the issue which we consider to be the controlling one disclosed by the pleadings and arguments of the parties, namely, the issue of unjust discrimination under a provision of California law enforceable by this Commission.

We hold that Pacific, in providing the facilities or service described in the International and All Metal agreements in question, did not violate the provisions against preference or prejudice set forth in section 453 of the California Public Utilities Code.

Accordingly, we conclude that the Commission's temporary restraining order, issued herein on August 16, 1966, should be dissolved and that International's complaint herein should be dismissed. Likewise, for the reasons stated above we conclude that the related complaint of All Metal, in Case No. 8421, should be dismissed, by separate order, however, contemporaneously to be issued in that case.

ORDER

It is Ordered that:

1. The temporary restraining order issued herein on August 16, 1966 be and said order hereby is dissolved.

2. The complaint of International Cable T.V. Corporation, filed herein on August 15, 1966, is dismissed.

The effective date of this order shall be ten days after the date hereof, subject to extension of said

effective date, by further order herein, upon good cause first having been made to appear to the Commission within said original ten day period.

Dated at San Francisco, California, this 9th day of November, 1966.

Peter E. Mitchell
President
William M. Bennett
A. W. Gatov
Commissioners

We will file a separate opinion.
/s/ Frederick B. Holoboff
/s/ George G. Grover

Appendix B

Decision No. 71698

Before the Public Utilities Commission
of the State of California

Case No. 8499

International Cable T.V. Corporation, a California corporation,
Complainant,
vs.
All Metal Fabricators, Inc., a California corporation, and The Pacific Telephone and Telegraph Company, a California corporation,
Defendants.

ORDER DENYING REHEARING

International Cable T.V. Corporation having filed a petition for rehearing of Decision No. 71559; and the Commission having considered said petition and each and every allegation therein, and being of the opinion that no good cause for granting a rehearing has been made to appear;

It is Ordered that said petition for rehearing be, and the same is, hereby denied.

Dated at San Francisco, California, this 13th day of December, 1966.

Peter E. Mitchell
President
A. W. Gatov
William M. Bennett
Commissioners

We would grant rehearing.
/s/ George G. Grover
/s/ Frederick B. Holoboff

Certified as a True Copy
E. H. Gielory
Assistant Secretary
Public Utilities Commission
State of California

Decision No. 71559

Before the Public Utilities Commission
of the State of California

Case No. 8499

International Cable T.V. Corporation, a California corporation,
Complainant,

vs.

All Metal Fabricators, Inc., a California corporation, and The Pacific Telephone and Telegraph Company, a California corporation,
Defendants.

DISSENTING OPINION OF COMMISSIONERS GROVER AND HOLOBOFF

We dissent. In our view, Pacific's pole contact policy and practices constitute a public utility offering.

"Dedication," "holding out," "public offering"—these concepts look to what a utility *does*. Procedural niceties are not controlling; reality is. Pacific has established on this record that it has a consistent policy with respect to CATV pole attachments; that policy is clearly public in concept: "first come, first

served"—"one customer only". There is nothing private or personal in this concept—indeed Pacific appears to stress how impartially it treats all comers.

More important, Pacific's pole attachment practices are inextricably linked to its channel facilities practices. There is no reality in the suggestion that the agreements are just like leases of vacant property. From the standpoint of the CATV industry (and that industry is the "public" we are talking about), the difference between a pole attachment "agreement" and a channel facilities "offering" is of secondary importance.

Since the pole attachment agreement is part of a public utility offering, the Commission should have considered and decided the issue of discrimination.

/s/ George G. Grover
/s/ Frederick B. Holoboff

December 31, 1966

Certified as a True Copy
Noel Coleman
Assistant Secretary
Public Utilities Commission
State of California

Appendix C

Jul 6 '67
Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
July 5, 1967

Dear Sir: I have this day filed Order
Petition for Writ of Review denied.
In re: SF No. 22494
Int. Cable T.V. Corp.
vs.
P.U.C. et al

Respectfully,
William I. Sullivan
Clerk

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
July 26, 1967

Dear Sir: I have this day filed Order
Rehearing Denied
In re: SF No. 22494
International Cable TV
vs.
P. U. C.

Respectfully,
William I. Sullivan
Clerk

Jul 27 '67

Appendix D

Public Utilities Code of the State of California, Section 1756—Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified. (Deering's California Codes, Vol. 1, Public Utilities Code, 1966 Pocket Supplement, pp. 34-35.)

Public Utilities Code of the State of California, Section 1757—No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the

findings and conclusions of the commission on reasonableness and discrimination. (Deering's California Codes, Vol. 1, Public Utilities Code, pp. 422-423.)

Public Utilities Code of the State of California, Section 1758—The commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article. (Deering's California Codes, Vol. 1, Public Utilities Code, pp. 427-428.)

Public Utilities Code of the State of California, Section 1759—No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases. (Deering's California Codes, Vol. 1, Public Utilities Code, p. 428.)

Public Utilities Code of the State of California, Section 1760—In any proceeding wherein the validity

of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final. (Deering's California Codes, Vol. 1, Public Utilities Code, p. 430.)

Public Utilities Code of the State of California, Section 1761—The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of the writ the Supreme Court in the manner provided in this article in its discretion may stay or suspend in whole or in part the operation of the commission's order or decision. (Deering's California Codes, Vol. 1, Public Utilities Code, p. 430-431.)

Public Utilities Code of the State of California, Section 1762—Except as provided in this section, no order staying or suspending an order or decision of the commission shall be made by the Supreme Court except upon five days' notice and after hearing. If the order or decision of the commission is stayed or suspended the order suspending it shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage, but the Supreme Court may grant a temporary stay

restraining the operation of the commission order or decision at any time before such hearing and determination of the application for a stay when, in its opinion irreparable loss or damage would result to petitioner unless such temporary stay is granted. Such temporary stay shall remain in force only until the hearing and determination of the application for a stay upon notice. The hearing of such application for a stay shall be given precedence and assigned for hearing at the earliest practicable day after signed for hearing at the earlies practicable day after the expiration of the notice. (Deering's California Codes, Vol. 1, Public Utilities Code, p. 431.)

Public Utilities Code of the State of California, Section 1763—No temporary stay shall be granted by the Supreme Court unless it clearly appears from specific facts shown by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and hearing had on a motion for a stay as provided in this article. Every such temporary stay shall be endorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it appears to be irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry not to exceed 10 days as the court may fix unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary stay is

granted without notice the matter of the issuance of a stay shall be set down for hearing at the earliest possible time, and when it comes up for hearing the party obtaining the temporary stay shall proceed with the application for a stay and if he does not do so the court shall dissolve the temporary stay. (Deering's California Codes, Vol. 1, Public Utilities Code, p. 432.)

Public Utilities Code of the State of California, Section 1764—In case the order or decision of the commission is stayed or a temporary stay granted, the order of the court shall not become effective until a suspending bond is executed and filed with and approved by the court, payable to the people of the State of California and sufficient in amount and security to insure the prompt payment by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission and of all money which any person or corporation may be compelled to pay pending the review of the proceedings, for transportation, transmission, product, commodity, or service in excess of the charges fixed by the order or decision of the commission, in case such order or decision is sustained. The court, in case it stays or suspends the order or decision of the commission in any matter affecting rates or classifications, may also in its discretion direct the public utility affected to pay into court from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under

such conditions as the court prescribes, all sums of money which it collects from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the order or decision of the commission had not been stayed or suspended. (Deering's California Codes, Vol. 1, Public Utilities Code, pp. 432-433.)

Public Utilities Code of the State of California, Section 1765—In case the Supreme Court stays any order or decision denying to the utility an increase in any rate or classification, the court may condition such stay or temporary stay so as to permit petitioner to charge a higher rate pending the determination of the review and may attach other reasonable conditions to such stay or temporary stay. (Deering's California Codes, Vol. 1, Public Utilities Code, p. 433.)

Public Utilities Code of the State of California, Section 1766—In case the Supreme Court stays or suspends any order or decision lowering any rate or classification or stays any order or decision denying petitioner the right to charge an increased rate or classification and as a condition thereof permits the charging of higher rates, the court shall require the public utility affected to keep such accounts, verified by oath as may, in the judgment of the court, suffice to show the amounts being charged or received by such public utility, pending the review, in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will

be refundable in case the order or decision of the commission is upheld. The court may from time to time require the petitioner to give additional security, or to increase the suspending bond, whenever in its opinion such action is necessary to insure the prompt payment of the damages and overcharges. If the final decision by the Supreme Court upholds the commission's order or decision, all money which the public utility has collected pending the appeal in excess of that authorized by the order or decision of the commission, together with such interest as may be reasonable, shall be promptly paid to the corporations or persons entitled thereto in the manner prescribed by the court. (Deering's California Codes, Vol. 1, Public Utilities Code, p. 434.)

Public Utilities Code of the State of California, Section 1767—All actions and proceedings under this part and all actions or proceedings to which the commission or the people of the State of California are parties in which any question arises under this part, or under or concerning any order or decision of the commission, shall be preferred over, and shall be heard and determined in preference to, all other civil business except election causes, irrespective of position on the calendar. The same preference shall be granted upon application of the attorney of the commission in any action or proceeding in which he is allowed to intervene. (Deering's California Codes, Vol. 1, Public Utilities Code, p. 435.)

In the Supreme Court

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United States

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OCTOBER TERM, 1967

No. 782

INTERNATIONAL CABLE T.V. CORPORATION, a California Corporation,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, GEORGE G. GROVER, and FREDERICK H. HOLOBOFF, the members of and constituting said Public Utilities Commission,

Respondents,

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California Corporation, and ALL METAL FABRICATORS, INC., a California Corporation,

Real Parties in Interest.

BRIEF OF THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, RESPONDENT AND REAL PARTY IN INTEREST, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN A. SUTRO,
NOBLE K. GREGORY,
WILLIAM E. MUSSMAN,
WALTER R. ALLAN,
225 Bush Street,
San Francisco, California 94104,
Attorneys for The Pacific Telephone and Telegraph Company, Respondent and Real Party in Interest.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 782

INTERNATIONAL CABLE T.V. CORPORATION, a California Corporation,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, GEORGE G. GROVER, and FREDERICK H. HOLOBOFF, the members of and constituting said Public Utilities Commission,
Respondents,

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California Corporation, and ALL METAL FABRICATORS, INC., a California Corporation,
Real Parties in Interest.

BRIEF OF THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, RESPONDENT AND REAL PARTY IN INTEREST, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This case does not present any substantial Federal question.

The California Public Utilities Commission determined that, under California law, an agreement under which The Pacific Telephone and Telegraph Company (hereinafter "Pacific") permitted petitioner to place petitioner's own lines on Pacific's poles did not involve a public utility service. It held for this reason that the only provision of California law enforceable by the Commission which was invoked by petitioner was not applicable to the situation.

Petitioner challenges this decision, asserting (1) that petitioner was denied a hearing in contravention of the Fourteenth Amendment, and (2) that the decision results in unreasonable discrimination in contravention of the Fourteenth Amendment. Petitioner, however, has not shown that he was deprived of a hearing or that the decision in any way involves unconstitutional discrimination. The petition therefore should be denied.

QUESTIONS PRESENTED

Petitioner's "Statement of Grounds" (Pet., pp. 3-4) is not accurate and the questions stated by petitioner (Pet., p. 4) are not present in this case.

The only questions presented to the California Supreme Court were (1) whether the California Public Utilities Commission properly limited its hearing and decision to the applicability of a provision of California law en-

forceable by the Commission and (2) whether the Commission correctly decided that the provision of California law in question was not applicable. Petitioner asserted but could not establish before the California Supreme Court that it was deprived of a hearing or that the decision involved unconstitutional discrimination.

STATEMENT OF THE CASE

Petitioner's statement of the case and the proceedings below is not accurate. This case involves two different agreements entered into by Pacific: (1) an agreement between Pacific and petitioner which permits petitioner to use vacant pole space to affix its own lines on Pacific's poles (Appx. A to Pet., pp. 26, 33-35), and (2) an agreement between Pacific and All Metal Fabricators, Inc. (hereinafter "All Metal") which provides that Pacific will furnish a communication channel service to All Metal which All Metal would use to transmit its signals to its customers (Appx. A to Pet., pp. 27, 32). Contrary to the implications in the petition (Pet., pp. 13-14), Pacific has not denied petitioner permission to affix its lines to Pacific's poles. Nor has Pacific denied to petitioner a service such as that provided to All Metal. It is thus apparent that petitioner's real objective is protection from competition from other operators who might desire to enter the field and utilize the channel service provided by Pacific.

The proceedings before the Commission and its decision were expressly limited to "the issue of unjust discrimination under a provision of California law enforceable by this Commission," namely "the provisions against

preference or prejudice set forth in section 453 of the California Public Utilities Code"[1] (Appx. A to Pet., p. 36).

The Commission determined that the agreement between Pacific and All Metal, the terms of which are not in dispute, did involve public utility service, while the agreement between Pacific and petitioner, which is also not in dispute, did not involve such a service (Appx. A to Pet., pp. 32-35). It concluded that petitioner was therefore not in like or similar circumstances with All Metal and section 453 of the California Public Utilities Code was consequently not applicable (ibid., pp. 35-36). The Commission made no other findings, and the California Supreme Court affirmed the Commission's decision without an opinion.

I. PETITIONER RECEIVED A FULL HEARING

Petitioner's unsupported assertions (e.g., Pet., p. 14) that there was no hearing "on the merits" are without foundation. The pages of the opinion of the California Public Utilities Commission (Appx. A to Pet., pp. 4, 6) to which petitioner refers (Pet., p. 14) themselves belie those assertions. The first of these pages states that a hearing was held and that "evidence and argument were received" (Appx. A to Pet., p. 4). The paragraph con-

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[1]Section 453 of the California Public Utilities Code provides:

"No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section."

cludes: "answers and memoranda have been filed and considered, along with the complaint, Pacific's 'Offer of Proof' (filed prior to the hearing) and the evidence and argument adduced at the hearing" (ibid.). The second page to which petitioner refers shows some of the evidence which was before the Commission, i.e., the various agreements in question and correspondence between the parties (Appx. A to Pet., p. 6, ftn. 2).

In the record before this Court, there is no basis for petitioner's claim that it did not receive a full hearing before the Commission. Petitioner has not supported its naked assertions in this regard by bringing up the record before the Commission to show, if it could, that the proceedings were inadequate. In such a situation, this Court will accept the findings of the Commission as correct.

Miss. Valley Barge Co. v. U.S. (1934) 292 U.S. 282, 286;

Edward Hines Trustees v. U.S. (1923) 263 U.S. 143, 148;

Nashville Ry. v. Tennessee (1923) 262 U.S. 318, 324.

Moreover, there are in the record before this Court discussions of the proceedings before the Commission and also some verbatim excerpts from the transcript of the hearing which show that petitioner misinterpreted the scope of the hearing below.[2] In its complaint before the

[2]These discussions and statements appear in (1) petitioner's Petition for Writ of Review or Mandamus to the California Supreme Court, pp. 16-18, 24-25; (2) Answer of the Pacific Telephone and Telegraph Company, Real Party in Interest, to the Petition for Writ of Review, pp. 8-13, 4-8; and (3) Answer of Respondent, the California Public Utilities Commission, to Petition for Writ of Review, pp. 4-8.

Commission, petitioner included numerous allegations asserting various claims under California law such as breach of contract and violation of the State antitrust law (see Petition for Writ of Review to the California Supreme Court, pp. 24-25; Appendix A to Petition for Writ of Review, pp. 10-14). It is, however, settled law in California that the Commission's function is to regulate public utilities and to enforce their obligations as utilities rather than to enforce nonpublic utility rights and obligations (*Motor Transit Co. v. Railroad Commission* (1922) 189 Cal. 573, 579, 209 Pac. 586, 589; *Ashley v. Railroad Commission* (1922) 188 Cal. 234, 236, 204 Pac. 825; *Atchison Etc. Ry. Co. v. Railroad Com.* (1916) 173 Cal. 577, 581-582, 160 Pac. 828, 830, appeal dismissed (1918) 245 U.S. 638; *Goodspeed v. Great Western Power Co.* (1939) 33 Cal.App.2d 245, 264, 91 Pac.2d 623, 633). Therefore, petitioner's allegations other than asserted violation of section 453 of the California Public Utilities Code were irrelevant to the proceeding before the Commission and were properly treated as such. It was the failure of the Commission to hold a hearing on these issues which formed the principal basis of petitioner's petition to the California Supreme Court. Having received a hearing on the only relevant issue (the applicability of section 453), petitioner has no constitutional right to a hearing on irrelevant issues.

The scope of the Commission's decision is clear on its face:

> "Notwithstanding the great number and variety of questions raised, the essential issue framed by the pleadings in this case (as well as by the pleadings in All Metal's complaint against Pacific, Case No. 8421) is one of unreasonable discrimination, asserted to

have been practiced by Pacific in the provision of agreements for pole attachments and distribution channels in partially overlapping areas in Los Angeles County covered by complainant's and All Metal's local CATV franchises. We must determine whether there has been 'any preference or advantage' or 'any prejudice or disadvantage' granted to or suffered by complainant which may be contrary to the provisions of section 453 of the Public Utilities Code.

* * * * * * *

"Our decision herein will be limited to the issue which we consider to be the controlling one disclosed by the pleadings and arguments of the parties, namely, the issue of unjust discrimination under a provision of California law enforceable by this Commission.

"We hold that Pacific, in providing the facilities or service described in the International and All Metal agreements in question, did not violate the provisions against preference or prejudice set forth in section 453 of the California Public Utilities Code." (Appx. A to Pet., pp. 31-36).

A denial by the California Supreme Court of a writ of review is an affirmance of the Commission's decision on the merits *(People v. Western Lines, Inc.* (1954) 42 Cal.2d 621, 633, 268 P.2d 723, 728, appeal dismissed 348 U.S. 859). The court below necessarily determined that the Commission properly limited its hearing and decision to a provision of State law enforceable by the Commission. Petitioner has thus failed to meet its burden of showing that the California Supreme Court decided the case on a substantial Federal ground *(Stembridge v. Georgia* (1952) 343 U.S. 541, 547; *Durley v. Mayo* (1956) 351 U.S. 277, 281-282).

II. THE COMMISSION'S DECISION IS REASONABLE AND INVOLVES NO UNCONSTITUTIONAL DISCRIMINATION.

In the decision below, the California Public Utilities Commission determined that:

1. Channel service provided by a telephone company either under a written contract or pursuant to a tariff offering constitutes "public utility service" (Appx. A to Pet., p. 32). All Metal had a channel service agreement with Pacific.

2. A pole attachment agreement does not constitute a "public utility service" offering (Appx. A to Pet., pp. 33-35). Petitioner had a pole attachment agreement with Pacific.

3. Petitioner was not in like or similar circumstances with All Metal and therefore Pacific did not violate the provisions of section 453 of the California Public Utilities Code against preferences or prejudice in the offering of utility service to All Metal (Appx. A to Pet., pp. 35-36).

Appellant asserts that this decision results in unreasonable discrimination in contravention of the Fourteenth Amendment (Pet., pp. 4, 18-22). It is plain, however, that there exist substantial distinctions between the two situations: Under a pole attachment agreement, the CATV operator is given permission to place *its own lines* on vacant pole space for a set fee per pole (see Appx. to Pet., pp. 26, 33). On the other hand, with respect to channel service, the telephone company constructs, owns, operates and maintains the equipment and provides a service to the CATV Company (see Appx. to Pet., pp. 27,

32). The Commission discussed these differences in its opinion. It pointed out that, in providing channel service,

> "Pacific constructs, owns, operates and maintains the plant used in the service and provides the energy for transmitting the signal through the facilities so constructed, in the same manner as it provides channels for transmission of other private line services related to telephony which, likewise, are offered to the public through facilities dedicated to the public use" (Appx. A to Pet., p. 32).

In regard to pole attachment agreements, the Commission observed:

> "Pacific's willingness, as pertinent to the present controversy, to enter into temporary individual license agreements with CATV operators for use by the latter of vacant space on its poles, is neither an offer nor a providing of 'public utility service', since the utility does not hold out such contracts impartially to the general public or does it thereby provide any 'service' related to the concept of dedication to the public of a communication service or facility which is the hallmark of a public utility calling" (Appx. A to Pet., p. 33).

These differences have been recognized in court decisions from other states which also have held that the rental of vacant pole space to CATV operators or others is not a public utility service.

Ceracche Television Corp. v. Public Service Com'n. (1960) 40 Misc.2d 554, 267 N.Y.S.2d 969, 972-973;

Consolidated Television Service, Inc. v. Leary (Ky. Ct.App. 1964) 382 S.W.2d 78, 80-81;

New York Teleph. Co. v. Telesystems Corp. (N.Y.S.Ct. 1965) 58 PUR3d 67, 69-70.

The distinctions have also been applied in decisions of public utilities commissions of other States. For example, in upholding a tariff for channel service, the New York Public Service Commission distinguished that service from other

> "• • • • ways in which antenna companies could conduct their operations. They could either build their own complete systems, including poles and cables, or attach their cables to poles owned by public utilities on which space had been rented.
>
> • • • • • • •
>
> "The telephone company does not propose, under its tariff T1, to become an antenna company. It is not going to sell any service to the owners of television sets or erect any master antennas. The service offering is limited to conveying (transporting or transmitting) for an antenna company, television signals from one point to another. Services of a like character are presently provided by the telephone company pursuant to filed tariffs; for example, the telephone company provides channels for teletypewriter, teleprinter, telephotography, telautograph, Morse, and fascimile communication. In addition, channels are provided for the transmission from point to point of program material such as music or other sound and for video program material. Similarly, the telephone company by offering channels to an antenna company is offering to provide a communication service—a variety of telephony or telegraphy—and nothing else."
>
> *(Re New York Telephone Company* (N.Y. PSC 1960) 34 PUR3d 115, 117, 121).

On the same grounds, commission decisions have uniformly held that the rental of pole space is not a public utility service.

WCOG, Inc. v. Southern Bell Teleph. & Teleg. Co. (N.C. Util. Com. 1966) 64 PUR3d 314, 316-319; *Jackson v. Michigan Bell Teleph. Co.* (Mich. PSC 1966) 63 PUR3d 384, 387.

And see *Re Southern Bell Telephone and Telegraph Company* (Fla. PSC 1966) 65 PUR3d 117, 120-121.

It is no answer for petitioner to merely assert, as it does (Pet. p. 20), that the distinction drawn by the California Public Utilities Commission (i.e., between a public utility communication service and an agreement which involves no public utility service) is irrelevant. As above shown, there are substantial differences which support that distinction. It is sufficient, in any event, under the Fourteenth Amendment if any state of facts reasonably may be conceived to justify the difference in treatment of the rental of pole space from the providing of channel service (*McLaughlin v. Florida* (1964) 379 U.S. 184, 191; *McGowan v. Maryland* (1961) 366 U.S. 420, 426).

III. THE COMMISSION'S DECISION IS SUPPORTED BY THE EVIDENCE.

Petitioner asserts as a separate ground that the Commission's decision was "not supported by substantial, or any, evidence" (Pet., p. 22). It is elementary that petitioner can state a Federal ground relating to the evidence only if the decision in question is "totally devoid of evidentiary support" (*Thompson v. Louisville* (1960) 362 U.S. 99). As we have pointed out (supra, p. 5), petitioner has failed to support its bare assertions regarding

lack of evidence and this Court will therefore accept the findings in question as correct.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Dated at San Francisco, California, November 30, 1967.

Respectfully submitted,

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In the Supreme Court of the United States

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OCTOBER TERM, 1967

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Respondents,

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California corporation, and ALL METAL FABRICATORS, INC., a California corporation,
Real Parties in Interest.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief of Respondents in Opposition

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Real Parties in Interest.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief of Respondents in Opposition

OPINIONS BELOW

On July 5, 1967, the Supreme Court of the State of California denied, without opinion, petitioner's Petition for Writ of Review of Decision No. 71559 of respondent Commission (hereinafter referred to as Commission), as yet

unreported but set out in Appendix A to the instant petition. On July 26, 1967, the Supreme Court of the State of California denied, without opinion, petitioner's request for rehearing of the order of July 5, 1967.

JURISDICTION

The basis of this Court's jurisdiction is set forth in the petition.

QUESTIONS PRESENTED

1. Whether petitioner was denied a hearing by the Commission in violation of its rights to due process of law.
2. Whether Commission Decision No. 71559 deprived petitioner of equal protection of the laws.
3. Whether Commission Decision No. 71559 is supported by substantial evidence.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED[1]

The Constitutional provision involved is Section 1 of the Fourteenth Amendment to the Constitution. The statute involved is Section 453 of the California Public Utilities Code..

STATEMENT

Petitioner's complaint before the Commission was a result of petitioner and All Metal Fabricators, Inc.[2] competing for the same community antenna television[3] market in the unincorporated area of Altadena in Los Angeles County.

On March 28, 1966, petitioner and The Pacific Telephone and Telegraph Company[4] entered into a pole attachment

1. Both are set forth at page 5 of the petition.
2. Hereinafter referred to as "All Metal".
3. Hereinafter referred to as "CATV".
4. Hereinafter referred to as "PT&T".

agreement. Under the terms of this agreement, petitioner leased vacant space on PT&T's telephone poles for petitioner's CATV pole attachments to be installed by petitioner at its expense.

A Memorandum of Agreement dated May 19, 1966, and a Contract for Community Antenna Television Facilities, dated June 13, 1966, were executed by PT&T and All Metal. Under the terms of the contract, All Metal's television signals were to be transmitted over PT&T's facilities in much the same manner that PT&T provides channels for the transmission of other private line services relating to telephony.

Petitioner, on August 15, 1966, filed a complaint with the Commission alleging that PT&T and All Metal had conspired to delay petitioner's entry into the CATV business by a crash program of building channel facilities for All Metal. In the complaint, petitioner sought damages, a cease and desist order, an order compelling PT&T to dismantle channel facilities thus far constructed, and Commission approval of its pole attachment agreement with PT&T.

The Commission, based on the allegation of the complaint and in order to preserve the status quo, on August 16, 1966, issued a temporary restraining order directing immediate cessation of PT&T's channel facilities construction and use of these facilities by All Metal. The Commission also ordered a hearing to be held on August 19, 1966, and directed PT&T and All Metal to file answers to the complaint.

A full day's hearing was held on August 19, 1966, producing a 140-page transcript. Several transcript references, standing alone, indicate that the hearing was limited solely to the issue of the temporary restraining order.[5] However,

5. At transcript pages 7, 13, 68, and 74, the hearing Examiner made statements to this effect.

at transcript page 76, the hearing examiner made quite clear the issue before the Commission. He stated:

> "EXAMINER GREGORY: I think as I view it now, without benefit of further advice from counsel, that the Commission is primarily interested at this stage in what is the nature of the facility involved in pole connection where the CATV operator provides his own line and his own hardware but simply uses the pole as a means to carry that line under an agreement with the utility on the one hand and as utility or non-utility nature, so far as the telephone company provision of that facility is concerned, which is the pole, and so forth, as distinguished from what apparently the parties concede to be utility service with respect to provision of channel facilities by the telephone company, where it installs the actual lines to the poles, and whether or not there is such a difference as would indicate that there is a line of cleavage so far as this Commission's jurisdiction may be concerned over recognition of pole attachment agreements filed by the telephone company and the channel agreements, so that we perhaps have something to do with the pole attachment and we might not have anything to do with the channel."

At page 77 of the transcript, the hearing examiner, after discussing the question of Federal Communications Commission jurisdiction, stated:

> ". . . I think we have to make up our minds before we determine just how far ahead we are going to go with this proceeding; that is, the merits and all the rest of it, because aside from whatever may be the defects in the complaint it perhaps alleges more than this Commission can handle in certain prayers made in the complaint. To the extent that the complaint may state a cause of action within this Commission's jurisdiction, assuming that there are issues framed by answers, we have to have a further consideration of those after we dispose of these preliminary issued."

It was then stated that this issue could best be disposed of by the parties filing memoranda of points and authorities.

At this point in the hearing, petitioner introduced the testimony of one of three witnesses present at the hearing. The testimony of this expert witness resulted in 56 pages of testimony. The content of this testimony, as stated by counsel for petitioner, at transcript page 72, was to describe the burden on the existing interstate telephone plant in connection with petitioner's request for a continuation of the temporary restraining order, and also "some of his comments may go to the question of jurisdiction and may be of some benefit to the Commission in that respect."

At the conclusion of the hearing, the following exchange took place between the hearing examiner and petitioner's counsel:

> "EXAMINER GREGORY: Is there anything further you gentlemen wish to bring up by way of testimony or further argument on this record other than written statements?
>
> MR. FARROW: No, Mr. Examiner. I think I have offered enough today on what I feel our position is."

After receipt of memoranda of points and authorities from all parties, the Commission issued Decision No. 71559 dismissing petitioner's complaint and dissolving the temporary restraining order. In that decision the Commission found the controlling issue of the complaint proceeding to be whether PT&T had unjustly discriminated against petitioner contrary to the provisions of Section 453 of the California Public Utilities Code. (Petition, Appendix A, p. 31).

Relying on the authority of a 1954 PT&T rate case,[6] the Commission held that, in the absence of a public offering,

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6. *Pacific Telephone and Telegraph Co.*, 53 Cal.P.U.C. 662, 664-666.

the rental or licensing by PT&T of vacant space on its telephone poles to CATV operators does not constitute public utility service (Petition, Appendix A, p. 35), and therefore such contracts need not be approved by the Commission.

The Commission concluded that petitioner, in executing a pole attachment agreement with PT&T, is not in like, or similar, circumstances with All Metal, whose agreement calls for the rendition of public utility service[7] in all respects like other private line services provided by PT&T[8] which are subject to different charges, restrictions and conditions of service than found in PT&T's pole attachment agreements. (Petition, Appendix A, p. 35).

ARGUMENT

I. Petitioner Knew the Issues Before the Commission and Received a Full Hearing on Them

Petitioner misconstrued the facts by alleging the Commission hearing of August 19, 1966 was limited to the issue of the temporary restraining order issued by the Commission. (Petition, page 6). The excerpt from the transcript quoted herein leaves no doubt that at that hearing the Commission was primarily concerned with the issue of whether PT&T's rental of vacant telephone pole space was a public utility service. It was made explicit by the hearing examiner that this threshold issue would be resolved before further hearings were scheduled or petitioner's complaint dismissed. (p. 4, *supra*).

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7. The Commission relied upon *Pacific Telephone and Telegraph Co.—Omni-Video, Inc.*, 63 Cal.P.U.C. 388.

8. E.g., teletypewriters, telephotographic and facsimile services, etc.

Petitioner objected neither at the hearing nor in its memorandum of points and authorities that the issue as framed by the hearing examiner would be decided on the basis of written memoranda rather than testimony. At no point during the proceedings did petitioner contend that any testimony was necessary to decide the matter.[9] Further, at the close of the hearing, in response to an inquiry of the hearing examiner, petitioner's counsel stated he had offered sufficient evidence to make clear to the Commission the position of petitioner.

Petitioner states the Commission finding that the leasing of vacant telephone pole space is different in kind, rather than degree, than the leasing of telephonic channel facilities, was a question of fact and was ". . . made without hearing, and without allowing petitioner an opportunity to produce evidence relevant to the question." (Petition, p. 15.) Variations of this argument are repeated by petitioner on the following two pages of the petition. These allegations are incorrect. The record shows that there was, in fact, a full hearing and that petitioner had the opportunity but saw fit not to present evidence on these questions at either the hearing or in its written memorandum to the Commission. To allege, as it does at page 3 of the petition, that the Commission rendered the decision without giving petitioner an opportunity to be heard on the issues of law and fact decided is untenable.

Petitioner's active participation in the Commission proceeding by argument, the presentation of testimony of an expert witness, and by written memorandum make it abundantly clear petitioner knew the scope of the proceeding, and, obviously, once the threshold issue was decided ad-

9. The testimony of petitioner's expert witness went primarily to the merits of the complaint.

versely to petitioner, the issues raised by the complaint were rendered moot.

II. The Dismissal of Petitioner's Complaint by the Commission Did Not Deprive Petitioner of Equal Protection of the Laws

This court stated in *Morey v. Doud*, 354 U.S. 457 (1957), at page 466, that distinctions in treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved. The basis for the difference in classification of PT&T's services provided petitioner and All Metal was made explicit by the Commission in Decision No. 71559. The Commission carefully set out its reason for each classification:

> The CATV channel facilities and service provided by Pacific [PT&T] either by written contract or pursuant to a tariff offering, unquestionably constitute "public utility service." Pacific constructs, owns, operates and maintains the plant used in the service and provides the energy for transmitting the signal through the facilities so constructed, in the same manner as it provides channels for transmission of other private line services related to telephony which, likewise, are offered to the public through facilities dedicated to the public use. Unless such CATV channel facilities are offered to the public by a filed tariff, authority must first be obtained by Pacific, pursuant to General Order No. 96-A, to make effective any special contract for their provision. (Petition, Appendix A, p. 32.)
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> • • • • • • •
>
> Pacific's willingness, as pertinent to the present controversy, to enter into temporary individual license agreements with CATV operators for use by the latter of vacant space on its poles, is neither an offer nor a providing of "public utility service", since the utility does not hold out such contracts impartially to the general public or does it thereby provide any "serv-

ice" related to the concept of dedication to the public of a communication service or facility which is the hallmark of a public utility calling. (Id., p. 33.)

* * * * * * *

We hold, therefore, that in the absence of a public offering the rental or licensing by Pacific of vacant space on its poles to CATV operators does not constitute a "public utility service". Therefore, authorization by this Commission of the pole attachment agreement between Pacific and International [petitioner] dated March 28, 1966 is not necessary. Special individual contracts by Pacific for use of such facilities should, however, under the procedural rules mentioned above, be supplied for the information of this Commission.

It follows that complainant [petitioner], possessing a pole attachment agreement with Pacific is not in like, or similar, circumstances with All Metal, whose agreement with Pacific calls for rendition of a public utility service in all respects like other private line services provided by Pacific and which is subject to different charges, restrictions and conditions of service than those found in Pacific's pole attachment agreements. (Id., p. 35.)

The Commission, lacking jurisdiction over CATV operators,[10] was concerned only with PT&T's activities and merely concluded that the renting of vacant telephone pole space was not a public utility activity. Not being a public utility activity, the Commission lacks jurisdiction to entertain petitioner's complaint, and its dismissal was proper.

III. Decision No. 71559 Is Supported by Evidence

Assuming arguendo that the issue of public utility status of telephone pole space lease agreements presents a question of fact, Decision No. 71559 is amply supported by evidence.

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10. *Television Transmission, Inc. v. Public Utilities Commission*, 47 Cal. 2d 82 (1956).

Channel service agreements, such as All Metal's, are filed with the Commission, pursuant to Commission's General Order 96-A, because they are offerings of public utility service. All pole attachment agreements are filed with the Commission in order to "bring to the knowledge of the Commission the nature and extent of such contracts." (*The Pacific Telephone & Telegraph Co.*, 53 Cal.P.U.C. 662, 664-665 (1954)). Thus, both the All Metal channel service agreement and petitioner's pole attachment agreement were before the Commission.[11]

At the hearing of August 19, 1966, evidence and argument were received, defendants were directed to file answers, and the parties to file memoranda of points and authorities. The answers and memoranda were filed and considered by the Commission together with the complaint, PT&T's "Offer of Proof" filed prior to the hearing, and the evidence and argument adduced at the hearing.

The Commission based its decision on far more than a few facts gleaned from admissions in the pleadings as petitioner alleges (Petition, p. 22).

IV. No Important Federal Question Is Raised by Petitioner

This court's review of the Commission proceedings is not warranted. Decision No. 71559 was concerned with the narrow question of the public utility status of an agreement leasing vacant telephone pole space. Neither this decision nor petitioner's allegations concerning it raise important federal questions.

The California Supreme Court reviewed petitioner's contentions regarding Decision No. 71559. That review, al-

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11. The parties stipulated to the existence of the pole attachment agreement (Transcript, p. 18) and the hearing examiner took notice of the Channel service agreement (Transcript, p. 34).

though limited on issues of fact, is not limited on constitutional questions.[12] However, petitioner has not shown that the California Supreme Court decided the matter on a federal ground. This Court in *Stembridge v. Georgia*, 343 U.S. 541 (1952), stated at page 547:

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment."

In the proceeding before the California Supreme Court, although petitioner alleged deprivation of federal constitutional rights, that court could have decided the matter on the same basis as the Commission had, i.e., PT&T's agreements renting vacant telephone pole space do not constitute a public utility service.

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12. Public Utilities Code § 1760 provides:
In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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